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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. [redacted] 132

STANLEY G. BANDEEN, - - - - - - Petitioner,

versus

E. M. HOWARD, J. WATTS STOVALL, BRUCE UNDERWOOD, GEORGE S. COON, THOMAS P. LEONARD, W. H. FULLER, CARL J. JOHNSON, R. W. ROBERTSON, CLARENCE DAVIS, Individually and Collectively as Constituting the STATE BOARD OF HEALTH OF KENTUCKY, and

JAMES F. QUEENAN, Clerk of the Jefferson County Court, - - - - - - - Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM A. LAMKIN, JR.,
JOHN P. GODFREY, JR.,
620 South Third Street,
Louisville 2, Kentucky,
Counsel for Respondent.

Dated: July 1, 1957.

WESTERFIELD-BONTZ CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 1018.

STANLEY G. BANDEEN, - - - - - *Petitioner,*

v.

E. M. HOWARD, J. WATTS STOVALL, BRUCE UNDERWOOD, GEOGRE S. COON, THOMAS P. LEONARD, W. H. FULLER, CARL J. JOHNSON, R. W. ROBERTSON, CLARENCE DAVIS, Individually and Collectively as Constituting the STATE BOARD OF HEALTH OF KENTUCKY, and

JAMES F. QUEENAN, Clerk of the Jefferson County Court, - - - - - - *Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

Respondents, E. M. Howard, *et al.*, who constitute the members of the Kentucky State Board of Health, respectfully request that the Petition for Writ of Certiorari herein be denied upon the grounds hereinafter set forth.

OPINIONS BELOW.

1. The findings and order of the Kentucky State Board of Health appears on page 47 as Appendix A-1.

2. The report of the Governor's commissioner appears on page 49 as Appendix A-2.

3. The decision of the Governor of the Commonwealth of Kentucky appears on page 50 as Appendix A-3.

4. The opinion of the Franklin Circuit Court appears on page 51 as Appendix A-4.

5. The judgment of the Franklin Circuit Court appears on page 52 as Appendix A-5.

6. The opinion of the Court of Appeals of Kentucky is officially reported as 299 S. W. 2d 249 and appears on page 54 as Appendix A-6.

7. The decision and order of the Federal Trade Commission in the matter of Koch Laboratories, Inc., *et al.* (Docket No. 4772), appears on pages 64-83 as Appendix A-7.

The report of the Governor's commissioner, the decision of the Governor of the Commonwealth of Kentucky, and the decision and order of the Federal Trade Commission, referred to above, are not included in the Petition for Writ of Certiorari.

JURISDICTION.

Respondents earnestly contend that the judgment of the Court of Appeals of Kentucky in the case at bar rests on a state jurisdictional ground adequate to sustain it independent of any federal question and, therefore, this Honorable Court is without jurisdiction. It is our contention that a determination by a state's highest court as to the distribution of jurisdiction of the inferior courts of such state is not reviewable by the Supreme Court of the United States. This contention is discussed at length beginning on page 18 of this response.

STATUTES INVOLVED.

The Kentucky Statutes involved in this action are:

1. Section 311.110 (1948 Ed.) of the Kentucky Revised Statutes—Grounds for Suspension or Revocation of Licenses—which appears on page 84 as Appendix B-1.

2. Section 311.120 (1948 Ed.) of the Kentucky Revised Statutes—Hearings on Suspension, Revocation; Appeal to Governor from Action Concerning License—which appears on page 85 as Appendix B-2.

3. Subsection (1) of Section 311.595 (1952 Act) of the Kentucky Revised Statutes—Grounds for Revocation—which appears on page 86 as Appendix B-3.

4. Subsection (4) of Section 311.595 (1952 Act) of the Kentucky Revised Statutes—Authorizing Ap-

peal to Jefferson Circuit Court—which appears on page 88 as Appendix B-4.

5. Section 311.555 (1952 Act) of the Kentucky Revised Statutes—Legislative Purpose Defined—which appears on page 89 as Appendix B-5.

6. Section 311.615 (1952 Act) of the Kentucky Revised Statutes—Continuation of Existing Licenses—which appears on page 89 as Appendix B-6.

Subsection (1) of Section 311.595 (1952 Act), Subsection (4) of Section 311.595 (1952 Act), Section 311.555 (1952 Act), and Section 311.615 (1952 Act), do not appear in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED.

Under this heading, petitioner has listed three questions. The questions as worded by the petitioner, in our opinion, are misleading and do not truly reflect the facts or issues in this case.

The petitioner couches his first question in the following language:

> "Did the State Board of Health of Kentucky have jurisdiction to hear proceedings to revoke the license of Dr. Stanley G. Bandeen to practice osteopathy which had been granted to him by it, without complying with the Statute by furnishing copy of any complaint?"

The respondents consider the wording of this question very misleading and unfair in view of the conclusive evidence that a copy of a complaint was fur-

nished to the petitioner and, in fact, appears in the appendix of the Petition for Writ of Certiorari on page 36. Respondent, therefore, submits that the question should be divided into two parts to read as follows:

(1) Did the State Board of Health of Kentucky have jurisdiction to hear proceedings to revoke the license of Dr. Bandeen to practice osteopathy which had been granted to him by it?

(2) Was Bandeen furnished with an adequate complaint sufficient to apprise him of the charges against him in compliance with the Statute of Kentucky relating thereto?

The petitioner couches his second question in the following language:

> "Can the State Board of Health of Kentucky admittedly consider as evidence, and base its decision at least in part upon, facts not in evidence?"

Actually, the petitioner discusses this contention under the title "Fair and Impartial Hearing," on page 20 of the Petition, and we, therefore, believe this question should read as follows:

> Did the Kentucky State Board of Health deny petitioner a fair and impartial hearing?

The petitioner's third question reads as follows:

> "Is an Order of the State Board of Health of Kentucky revoking a license to practice osteopathy, never affirmed by the Governor while law

in effect, and made without finding any specific facts as basis for such an order, valid and enforceable?"

The wording of this question is most misleading and completely ignores the facts of the case and represents a legal conclusion contrary to that expressed by the Court of Appeals of Kentucky. The Court of Appeals of Kentucky held that the change in the statutory law of Kentucky did not nullify the Board's order of revocation. In our opinion, the question should be divided into two parts to read as follows:

(1) Are the decisions of the highest court of a state, as to the construction and application of its own statutes, binding on the Supreme Court?

(2) Were the findings and order of the State Board of Health legally sufficient?

STATEMENT OF THE CASE.

(1) Proceeding Before the Board.

The Board proceeding against Dr. Bandeen is succinctly stated in the opinion of the Court of Appeals of Kentucky which reads as follows:

"On April 18, 1950, Bandeen received a letter from the secretary of the Board notifying him to 'show cause' within thirty days why his license should not be revoked because of 'grossly unprofessional or dishonest conduct of a character likely to deceive or defraud the public in the treatment

of cancer and tuberculosis.' This proceeding was pitched under KRS 311.110(4), then in force. Bandeen appeared and filed special and general demurrers on the grounds that no complaint had been entered against him and that he had not been furnished with a copy of any complaint that might have been filed against him pursuant to KRS 311.120(1), which was in effect at the time. Thereupon this meeting of the Board was adjourned and thereafter the secretary of the Board, by a communication dated August 4, 1950, notified Bandeen of a hearing to be held before the Board on September 7, 1950, and attached a copy of a complaint setting out certain specific charges. These charges were, briefly stated, using medicines of doubtful value, imposing excessive charges, making unjustified promises of cure and deceiving patients about their physical condition, following unorthodox diagnostic procedures, employing scare tactics, and failing to provide for adequate relief of pain. A list of six patients and their dates of treatment, with reference to whom the charges were made, was appended. This complaint was demurred to on the ground that the notice did not give sufficient information as to the time and place of the treatments as to the parties involved. The demurrer was overruled."

In reviewing the evidence introduced at the Board hearing the Court of Appeals of Kentucky gave the following resumé:

"* * * an exhibit in the record shows Bandeen was listed in the classified ad section of the Louisville telephone directory as a 'Doctor of Medicine'. The secretary of the Board stated that

demands had been repeatedly made upon Bandeen, beginning as far back as 1944, to discontinue this type of listing, but such demands were not acceded to until shortly before the hearing of this case by the Board. Bandeen frankly admitted at the hearing he had no right to advertise as a 'Doctor of Medicine'. * * *

"The label of 'miracle doctor' had become attached to Bandeen in the community where he practiced. He denied he ever referred to himself in such fashion, but he freely conceded he was recognized for his outstanding curative powers and indicated this reputation was justified because of the 'marvelous recoveries' he had effected by the type of treatments he employed. He administered the so-called 'Koch shots' to patients he diagnosed to have cancer. His charges for these shots ranged from $100 to $150. He testified he procured the substance he injected into his patients from an organization or cult known as the Christian Medical Research League of Detroit, Michigan, at a cost of $25 per shot. When one of the Board members inquired whether his charges for the shots were not out of proportion to their cost, he claimed every treatment also included an examination of the 'eyes, ears, nose, throat, heart, lungs, rectum, nerves, teeth, tonsils, etc.' He declared he was aware the 'Koch shots' had been fully investigated by the American Medical Association and had not been recommended by it. He also stated he was virtually the only practitioner in Kentucky who subscribed to this method of treatment.

"One of Bandeen's patients, Mary Frances Rucker, was pronounced by him to have a cancer-

ous tumor, and, according to her husband, Everett Rucker, she grew worse and Bandeen said he could cure her and gave her three 'Koch shots', charging $100 for each. When Bandeen went to see her he made a remark in the presence of both Rucker and his wife that a rubber sheet should be placed under the latter because 'she's going to burst wide open and die right now.' Rucker stated his wife was in great pain and Bandeen did nothing to relieve her He also testified Bandeen's statement so frightened his wife that she 'went crazy as a bedbug' and had to be later confined in the Central State Hospital as a lunatic where she remained about two months. She died some sixteen months later.

"Lue Limp testified Bandeen performed hemorrhoid surgery upon her, charging her $150 for the operation. He told her 'cancer would be her trouble later', and offered to give her a cancer shot for an additional $150. She said this diagnosis induced her to submit to an injection. Subsequently she went to Doctor Henry Asman who operated on her for hemorrhoids and advised her she did not have cancer.

"John Fred Herms, who had been twice operated upon for a cancerous condition in the throat and had been informed he did not have long to live, went to Bandeen for treatment when he heard he was a 'miracle doctor'. Bandeen said he considered Herms' case hopeless. Nevertheless, he administered a shot to Herms. The latter's mother testified that while he was suffering excruciating pains Bandeen gave him some tablets which he enjoined him not to take unless he had 'dying pains'. Herms died five days later.

"Bandeen took the stand and testified in his own behalf and introduced only one witness, his office nurse. The tenor of his testimony, as a whole, was to justify his curative methods.

"Uncontroverted testimony was developed to the effect that Bandeen had paid for a listing in the Louisville telephone directory as a 'Doctor of Medicine', although he did not have this professional status, and had in 1944, and several times thereafter, been warned by the Board to have the listing removed, which warning he ignored until this proceeding was begun. He also gave the so-called 'Koch shots' for cancer treatments, with knowledge that after investigation the American Medical Association had branded the use of such a substance valueless therapeutically. It was brought out that Bandeen charged $100 to $150 for each 'Koch shot' while the cost of each shot was only $25. He gave conflicting testimony as to what the services for each charge involved. It was stated Bandeen refused to relieve pain on two occasions and employed methods that terrorized on another. All this was denied by him. There was proof that Bandeen claimed in several instances that 'Koch shots' would cure cancer. He refuted this testimony in part."

The opinion also correctly states that "on December 13, 1951, upon the basis of the evidence recited, the Board found that Bandeen 'while a licentiate of said Board, engaged in acts and conduct that were grossly unprofessional and dishonorable and of such character that they were likely to, and did, deceive and defraud the public and certain patients and persons, within the meaning of KRS 311.110(4).'"

(2) Proceedings Before the Governor.

Section 311.120(3) of the Kentucky Revised Statutes, before its repeal effective June 19, 1952, provided that a licensee whose license had been revoked by the Board may appeal to the Governor who may affirm or overrule the decision of the Board. Bandeen appealed to the Governor after the Board entered its order on December 13, 1951. While the matter was pending before the Governor, the General Assembly of Kentucky, at its 1952 session, passed a comprehensive act relating to physicians and osteopaths which became effective June 19, 1952, and which repealed Section 311.120(3) as well as the other provisions of the Medical Practice Act of 1904. By Section 311.595(1) of the 1952 Act, the Board retained its authority to revoke licenses on an expanded number of grounds and these included the four grounds listed under the repealed statute. The new enactment deleted the right of an appeal to the Governor set forth in KRS 311.120(3), a part of the old Act and provided that review of orders of the Board shall be by appeal to the *Jefferson Circuit Court*.

Bandeen, however, continued to prosecute his appeal to the Governor even though the 1952 Act abolished such administrative appeals. The Governor of Kentucky, at the time, the Honorable Lawrence Wetherby, appointed Honorable Marion Rider, a prominent member of the Franklin County Bar, to hear and consider the appeal and render a report with recommendations.

Counsel for Bandeen appeared before Commissioner Rider on July 8, 1952, and again on July 10, 1952, and argued Bandeen's appeal to the Governor. At no time did Bandeen's counsel claim or even suggest or infer that the Act that became effective on June 19, 1952, invalidated the Board's order of revocation. On the contrary, he based his argument entirely upon the law in effect prior to the effective date of the 1952 Act.

In a brief, filed with Commissioner Rider by Bandeen's counsel on July 8 or 10, 1952 (which is subsequent to the effective date of the 1952 Act), it is stated in part (italics ours):

> "This action is pending on appeal from an order of the State Board of Health. This appeal is taken pursuant to Section 311.120(3) Kentucky Revised Statutes. That section has controlled the hearings in proceedings for suspension or revocation. It provides in all cases of suspension or revocation, the right of appeal to the Governor, *who is given by that Statute the authority to affirm or overrule.*
>
> "The Order in this case was entered on December 13, 1951, to become effective on December 30, 1951, unless appealed to the Governor, and if appealed to stand suspended *pending decision by the Governor.*
>
> "Dr. Bandeen contends that the State Board of Health had no authority to hold the proceedings involving him, or to make the Order which the Board entered on December 13, 1951. This is *not* based on lack of statutory authority, but on failure

to follow the required procedure under the Kentucky Statutes."

In a brief, filed with Commissioner Rider by Bandeen's counsel on July 24, 1952 (which is subsequent to the effective date of the 1952 Act), it is stated in part (italics employed for emphasis):

> "A proceeding against Dr. Stanley G. Bandeen was instituted before the State Board of Health of Kentucky. The proceeding resulted in the State Board entering an order for revocation of Dr. Bandeen's license to practice osteopathy.
>
> "The Statute under which the proceeding was instituted gave the right of appeal to the Governor. The Order of the Board was appealed within the time allowed. So the case is now before the Governor and his Commissioner in chief.
>
> "As we understand, *the law places no limitation on the Governor's review of an order of the State Board. The appeal leaves to him a decision on both law and facts.*"

Thus it is clear that Bandeen and his counsel at no time took any steps to dismiss or abandon the administrative appeal to the Governor but, on the contrary, consistently contended that Bandeen was entitled to have the appeal decided by the Governor under the law that was in effect at the time the appeal was taken.

Under date of January 14, 1953, Commissioner Rider reported to Governor Wetherby that the evidence supported the Board's order of license revocation and that it should be affirmed. (See Appendix A-2 which appears on page 49.)

Under date of March 11, 1953, the Honorable Lawrence W. Wetherby, as Governor of Kentucky, adopted the report of Commissioner Rider and affirmed the Board's order of license revocation. (See Appendix A-3 which appears on page 50.)

(3) Proceedings in the Franklin Circuit Court.

Shortly after the newspaper announcement of the decision of the Governor affirming the Board's order of license revocation, and before the Board received a copy of the Governor's decision, Bandeen filed a petition in the Franklin Circuit Court seeking to set aside the Board order and Governor Wetherby's affirmance thereof, and seeking to permanently enjoin the Board and the Governor and the County Court Clerk from putting into effect said order of revocation. An answer was filed, after which Bandeen filed a reply which was controverted of record. The Franklin Circuit Court, on January 20, 1954, overruled Bandeen's demurrer and motion to strike, and entered a judgment finally dismissing his petition, and setting aside and vacating the temporary restraining order previously issued by the clerk. However, for the purpose of preserving the *status quo* pending Bandeen's appeal to the Court of Appeals, the Franklin Circuit Court, over the Board's objections, granted an injunction pending said appeal.

It is interesting to note that Bandeen diligently and vigorously prosecuted his administrative appeal to the Governor under the previous Act (KRS 311.120(3), 1948 Edition) even after the effective date of the Ken-

tucky Medical and Osteopathic Practice Act of 1952 and did not claim that this latter act invalidated or affected the previous statute until after the Governor had affirmed the Board's findings and order. It is also interesting to note that although Bandeen alleges in substance, in his petition in the Franklin Circuit Court, that the 1952 Act superseded the statutes in effect at the time of the Board's order of license revocation and at the time of his appeal to the Governor therefrom, he overlooked the fact that the 1952 Act provided that judicial review of orders of the Board shall be by appeal to the *Jefferson Circuit Court.* (See Subsection (4) of Section 311.595 (1952 Act) which appears on page 88 as Appendix B-4.)

It is clear that Bandeen's suit in the Franklin Circuit Court was a frantic effort on his part to attempt to defeat enforcement of the Board order of license revocation, by such assertions and arguments that might appear expedient without too much regard for their consistency, logic or accuracy.

(4) Proceedings in the Court of Appeals of Kentucky.

On October 5, 1956, the Court of Appeals of Kentucky handed down a decision affirming the action of the State Board of Health in revoking Dr. Bandeen's license to practice osteopathy. The opinion was written by the Honorable Brady M. Stewart, Associate Justice of the Court and former Chief Justice. The opinion very meticulously discussed each and every contention advanced by Dr. Bandeen and held, among

other things, that Bandeen made a fatal jurisdictional error in appealing to the Franklin Circuit Court instead of the Jefferson Circuit Court which was the only court having jurisdiction. Dr. Bandeen then petitioned the Court of Appeals of Kentucky for a rehearing and on February 22, 1957, the Court denied his request for a rehearing.

(5) Exceptions to Statements of Fact and Inferences in Petition.

Respondents would like to point out to the Court that we take sharp exception to the statements and inferences in the petition to the effect that: Dr. Bandeen is an M.D.; that he has been issued a license to practice medicine by the Board; and that he was never furnished with a copy of the Board's complaint.

(A) BANDEEN IS NOT AN M.D.

The Court of Appeals opinion correctly points out that Bandeen "admitted that he did not hold the degree of Doctor of Medicine; that he had no right to use the professional title of 'Doctor of Medicine' or its abbreviation, 'M.D.'; and that he was not entitled to engage in the general practice of medicine * * *."

On page 112 of the transcript of evidence, Bandeen was asked: "Do you have a Doctor of Medicine degree?" Answer: "I do not."

If Bandeen has an "M.D." degree as is inferred by his petition, then he did not testify truthfully at the Board proceeding. It is significant also that Ban-

deen's name nowhere appears in the American Medical Association Directory as an "M.D.".

(B) BANDEEN WAS NEVER ISSUED A LICENSE TO PRACTICE MEDICINE BY THE BOARD.

Respondents likewise object to the inference in the petition that Bandeen was issued a license to practice medicine by the Board. Prior to 1932, osteopaths in Kentucky were not permitted to administer drugs, but in that year the Board authorized such by osteopaths provided they passed an examination conducted by the Board. Bandeen took such an examination and passed and was, therefore, authorized to administer drugs but he was never issued a license to practice medicine by the Board. His osteopathic license was merely changed to permit him to administer drugs. The Kentucky State Board of Health has never in its history issued a license to practice medicine to an applicant upon the basis of an osteopathic diploma. Osteopathic school graduates are eligible for licenses to practice osteopathy only. It is important to note that the hospitals in Kentucky do not afford hospital privileges to osteopaths. The public is certainly entitled to know to which branch of the healing arts a practitioner belongs.

(C) BANDEEN RECEIVED A COPY OF THE BOARD'S COMPLAINT.

Respondents likewise object to the inference in the petition that Bandeen did not receive a copy of a complaint. The evidence is conclusive that he did and, in fact, a copy appears on page 36 as Appendix B-4 of his Petition.

ARGUMENT.

(1) The Case at Bar Rests on a State Jurisdictional Ground Adequate to Sustain It Independent of Any Federal Question and Therefore This Honorable Court Is Without Jurisdiction.

It is essential to the jurisdiction of this Honorable Court on a petition for writ of certiorari to a state court that it appear affirmatively from the record, not only that a federal question was presented for decision in the state court but also that the state court's decision of the federal question was necessary to the determination of the cause and that the question as rendered could not have been made without deciding it.

McGoldrick v. *Gulf Oil Corp.*, 309 U. S. 2, 84 L. Ed. 536, 60 S. Ct. 375, vacated on rehearing in 309 U. S. 692, 84 L. Ed. 1034, 60 S. Ct. 512.
Lynch v. *New York*, 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16.
54 Am. Jur., Sec. 263, p. 901.

It is also well settled that a judgment of a state court, resting on grounds adequate to sustain it, independent of any federal question, is not reviewable even though the state court actually decided a federal question adversely to the party by whom the review is sought.

Petrie v. *Nampa & Meridian Irrigation Dist.*, 39 S. Ct. 25, 248 U. S. 154; 63 L. Ed. 178.
36 CJS, Federal Courts, Sec. 244, pp. 150, 151.
State Tax Commissioner of Utah v. *Van Cott*, 59 S. Ct. 605, 306 U. S. 511, 83 L. Ed. 950.

In 54 Am. Jur., United States Courts, Sec. 215, p. 847, it is stated:

> "Where a Federal question is present in the case, it is incumbent on the court, when it is urged that the decision of the state court rests upon a non-Federal ground, to ascertain for itself whether the asserted non-Federal ground independently and adequately supports the judgment. If it does, the appeal will be dismissed, especially where the disposition of such question might terminate the entire controversy and make it unnecessary to decide a substantial constitutional question."

See also:

Flournoy v. *Wiener,* 321 U. S. 253, 88 L. Ed. 708, 64 S. Ct. 548, rehearing denied in 321 U. S. 754, 88 L. Ed. 1090, 64 S. Ct. 548.

Holley v. *Lawrence,* 317 U. S. 518, 87 L. Ed. 434, 63 S. Ct. 394, rehearing denied in 318 U. S. 798, 87 L. Ed. 1162, 63 S. Ct. 531.

Lawrence v. *State Tax Commission,* 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, 87 A. L. R. 374.

Abie State Bank v. *Bryan,* 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252.

Respondents contend that the judgment of the Court of Appeals of Kentucky rests on grounds adequate to sustain it independent of any federal question and, therefore, this Court should refuse jurisdiction. This contention is based upon that part of the Court of Appeals of Kentucky opinion which states that the Jefferson Circuit Court was the only body with jurisdiction to hear Bandeen's appeal. The pertinent part

of the Court of Appeals opinion reads as follows (emphasis added):

> "Bandeen earnestly insists that the Board's order was voided while his appeal was pending before the Governor, since KRS 311.120(3) (1948 Ed.) was repealed without a saving clause. We do not agree. The simultaneous repeal and the reenactment of substantially the same statute, or of portions of it, do not at common law work a repeal of the former act, but the substituted statute is construed as a continuation of the original provisions. *Jones* v. *Kentucky State Board of Dental Examiners,* 291 Ky. 136, 163 S. W. 2d 297. *The jurisdiction of the Board was not disturbed, and the appellate jurisdiction was simply transferred from the Governor to the Jefferson Circuit Court.* Since the new legislation did not impair the previously existing right, nor deny a remedy for its enforcement, but only modified the proceedings while providing a similar remedy, the jurisdiction continues under the forms directed by the repealing act, in so far as the two acts differ. *Kingan & Co.* v. *Ossam,* 75 Ind. 548, 121 N. E. 289.
>
> "It would seem that, upon repeal of the section conferring jurisdiction upon the Governor to pass upon an appeal of this kind, *Bandeen should have appealed to the Jefferson Circuit Court, the only body with jurisdiction to hear the appeal under the existing law, and that, failing to follow this designated procedural step, he should be denied injunctive relief for this reason also.*"

It is well settled that a determination of a state's highest court as to the jurisdiction of the inferior

courts of the state is now reviewable by the United States Supreme Court.

36 CJS, Federal Courts, Sec. 267, p. 170.

Kersh Lake Drainage Dist. of Jefferson, Lincoln and Desha Counties v. *Johnson*, 60 S. Ct. 640, 309 U. S. 485, 84 L. Ed. 881, 128 A. L. R. 386.

Greenough v. *Tax Assessors of City of Newport*, 67 S. Ct. 1400, 331 U. S. 486, 91 L. Ed. 1621, 172 A. L. R. 329, rehearing denied 68 S. Ct. 28, 332 U. S. 784, 92 L. Ed. 367.

People of State of Ill., ex rel. McCollum v. *Board of Education of School Dist. No. 71, Champaign County, Ill.*, 68 S. Ct. 461, 333 U. S. 203, 92 L. Ed. 648, 2 A. L. R. 2d 1338.

Standard Oil Co. v. *State of New Jersey by Parsons, N. J.*, 71 S. Ct. 822, 341 U. S. 428, 95 L. Ed. 1078.

Beauharnais v. *People of State of Ill.*, 72 S. Ct. 725, 343 U. S. 250, 96 L. Ed. 919, rehearing denied 72 S. Ct. 1070, 343 U. S. 988, 96 L. Ed. 1375.

In *Petrie, et al.* v. *Nampa & Meridian Irrigation Dist.*, 39 S. Ct. 25, 248 U. S. 154, 63 L. Ed. 178, the Supreme Court of the United States, after discussing a federal question decided by a state court, said: "We cannot doubt that this conclusion of the state supreme court, based as it is wholly on state statutes and procedure, is broad enough to sustain the judgment rendered, irrespective of the disposition of any federal question involved, and therefore, the writ of error will be dismissed."

In 54 Am. Jur., United States Courts, Sec. 215, p. 847, it is stated that "the Court (meaning the Supreme Court of the United States) will not consider questions relating to the distribution of jurisdiction in the state courts; * * *." (See also *Honeyman* v. *Hanan,* 302 U. S. 375, 82 L. Ed. 312, 58 S. Ct. 273.)

In 54 Am. Jur., United States Courts, Sec. 246, p. 886, it is stated that "The United States Supreme Court is without jurisdiction on certiorari to review holdings of the state court which concern matters of state law and amount at most to alleged erroneous construction of statutes of a state by its own courts." (See also *Neblett* v. *Carpenter,* 305 U. S. 297, 83 L. Ed. 182, 59 S. Ct. 170, rehearing denied in 305 U. S. 675, 83 L. Ed. 437, 59 S. Ct. 335.)

That part of the opinion of the Court of Appeals of Kentucky which holds that Bandeen failed to appeal his case to the only circuit court in Kentucky having jurisdiction of the cause was an adequate non-federal reason sufficient to sustain the decision of the Court of Appeals independent of any federal question. If this Honorable Court agrees with our contention, then it is unnecessary to consider any of the questions raised by Bandeen because the whole case has been resolved. It should be carefully noted, however, that there was no attempt by the Court of Appeals of Kentucky to evade any federal question but, on the contrary, as is evidenced by the written opinion, they fully considered and ruled upon every contention advanced by Bandeen. Where there is no attempt to evade a federal question

by a state court, its decision on the independent non-federal ground will not be reviewed.

Broad River Power Co. v. *State of South Carolina, ex rel. Daniel,* 50 S. Ct. 401, 281 U. S. 537, 74 L. Ed. 1023.

McCoy v. *Shaw,* 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 89.

(2) The State Board of Health of Kentucky Had Jurisdiction to Hear Proceedings to Revoke the License of Dr. Bandeen to Practice Osteopathy.

(A) LICENSES TO PRACTICE HEALING ARTS ARE REVOCABLE.

It is elemental that the right to practice a healing art, such as medicine, osteopathy, optometry, dentistry, etc., is not inherent, and that a license therefor is not a contract and does not confer upon the holder a right to engage in the practice unrestricted. It is also elemental that a state may, in the exercise of its police power, refuse to grant such a license or revoke one already issued.

Reynolds v. *Walz,* 278 Ky. 309, 128 S. W. 2d 734.
Kendall v. *Beiling,* 295 Ky. 782, 175 S. W. 2d 489.
Forman v. *State Board of Health,* 157 Ky. 123, 162 S. W. 796.
41 Am. Jur., pp. 135, 172.

(B) GROSSLY UNPROFESSIONAL OR DISHONORABLE CONDUCT OF A CHARACTER LIKELY TO DECEIVE OR DEFRAUD THE PUBLIC CONSTITUTES VALID GROUNDS FOR LICENSE REVOCATION.

In 41 American Jurisprudence, at page 175, it is stated as follows:

> "No other ground for revocation is invoked as frequently, perhaps, as 'unprofessional', 'dishonorable', or 'immoral' conduct in connection with the practice of medicine or the particular branch or system thereof in which the licensee in question is engaged. Such conduct is specified as grounds for revocation in many of the statutes, and, as appears above, the validity of such statutes has been sustained by the courts in almost every instance. The quoted words, and other similar ones which are sometimes used in the statutes, are words of general rather than exact and definite significance."

As far back as 1914, the Court of Appeals of Kentucky in the case of *Forman* v. *State Board of Health*, 157 Ky. 123, 162 S. W. 796, sustained the validity of an Act of 1904 that authorized the Board to revoke licenses on the grounds stated therein which included, *inter alia*, grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public (KRS 311.110(4), 1948 Ed.). In that case the Court, in holding valid the 1904 Act, stated that the Board possessed authority to revoke a medical license on the ground of grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public, where the licensee engages in false and deceptive advertising that he can effect cures. The Court said, in pertinent part, as follows:

"The physician who advertises that he can cure a certain disease by a new method may be perfectly sincere in believing that he can do so. On the other hand, the quack and charlaton who frequently advertise that they can effect cures, when they know the advertisement to be false, and thus defraud and deceive the public, are guilty of fraudulent, dishonorable, and unprofessional conduct involving moral turpitude. *Whether the physician's acts were sincere or fraudulent and done for the purpose of defrauding the public is a question to be decided by the board on all the facts.*"

Of course, such unprofessional or dishonorable conduct as to authorize license revocation may consist of conduct other than false advertising. In 41 American Jurisprudence at page 176, it is said that "Various acts and conduct have been held by the courts to constitute unprofessional, immoral, or dishonorable conduct in connection with the practice of medicine sufficient to constitute grounds for revocation of a practitioner's license. In the case of *Freeman* v. *State Medical Examiners,* 54 Okla. 531, 154 Pac. 56, it was held that the acceptance of money upon the assurance or representation of being able to cure a disease regarded by the concensus of medical opinion as being incurable, constitutes unprofessional and dishonorable conduct warranting license revocation.

(C) THE BOARD POSSESSED AUTHORITY TO INITIATE THE PROCEEDING.

Nothing in the statutes in effect in 1950 (KRS 311.110 and 311.120, 1948 Ed.) prohibited the Board from initiating a revocation proceeding upon the basis of information received by the Board or by any member thereof.

It is firmly established that in the absence of express statutory prohibitions, an administrative agency may initiate investigations and proceedings upon its own motion or complaint. 72 Corpus Juris Secundum, page 407. In 42 American Jurisprudence at page 323, it is stated as follows:

> "In fact, the power and facilities of administrative agencies to investigate, initiate action, and control the range of investigation is one of the distinctive functions which sets them apart from the courts."
>
> *Federal Communications Commissions* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.
>
> *Whitten* v. *California State Board of Optometry*, 8 Cal. 2d 444, 65 P. 2d 1296, 115 A. L. R. 1.

The Board would indeed be a pusillanimous guardian of the public health if its functions were limited to merely umpiring controversies between licentiates of the Board and other individuals. Due regard for the spirit and purpose of the Act lodging in a competent body of professional men the power to regulate and control the practice of certain healing arts, nega-

tives any contention that the Board did not have the authority and duty to take affirmative action upon its own initiative in the public interest.

(D) NOTICE OF THE HEARING WAS ADEQUATE.

On or about April 17, 1950, the State Board of Health, acting through Bruce Underwood, M. D., its secretary, notified the petitioner in writing to appear before the Board on May 18, 1950, to show cause why his license to practice osteopathy in the Commonwealth of Kentucky should not be revoked because of grossly unprofessional and dishonorable conduct of a character likely to deceive and defraud the public. (A copy of this first notice appears on page 90 as Appendix C-1.)

The petitioner personally appeared before the Board on May 18, 1950, with his attorney, Blakey Helm, who thereupon filed a special demurrer and a motion for a copy of the complaint. On the same date, the Board, by action reflected in the official minutes of its meeting held on May 18, 1950, overruled the special demurrer *but sustained the motion for a copy of the complaint and indefinitely continued the case without hearing any evidence at that time.*

Thereafter, on August 4, 1950, the Board, acting through Bruce Underwood, M. D., its secretary, notified the petitioner in writing that the hearing had been set for 10 A.M. on September 7, 1950, at the offices of the Board at 620 South Third Street, Louisville, Kentucky, and furnished to the petitioner, as an attachment to said written notice, a copy of the complaint containing a statement of general and specific charges. For

the convenience of the Court, the Board's "Notice" and "Copy of Complaint" referred to above are set out below.

"August 4, 1950

"Stanley G. Bandeen, D.O.
Fincastle Building
Louisville 2, Kentucky

"Dear Doctor Bandeen:

"Pursuant to an agreement reached with your attorney, Honorable J. Blakey Helm, at your hearing in Frankfort on May 18, 1950, and pursuant to the provision of Chapter 311 of the Kentucky Revised Statutes, you are hereby cited to appear for a hearing before the State Board of Health in the offices of the Board at 620 South Third Street, Louisville, Kentucky, at 10:00 A.M. Central Daylight Saving Time, on Thursday, September 7, 1950, to show cause why your license to practice osteopathy in the State of Kentucky should not be suspended or revoked because of the charges which are outlined in the copy of the complaint which is attached hereto.

"You may appear in person or by counsel or both, as you may choose. If you are unable to attend the hearing, you must present satisfactory, substantiating evidence to the State Board of Health or make some other arrangement satisfactory to the Board.

Respectfully,

Bruce Underwood, M. D.
Secretary

BU/bh
Encl.
Via—Registered Mail"

"COPY OF COMPLAINT

"1. General Charge

"The general charge is that of 'grossly unprofessional or dishonorable conduct' of a character likely to deceive or defraud the public' as provided in Subsection (4) of Section 311.110 of the Kentucky Revised Statutes.

"2. Specific Charges

"The specific charges are as follows:

a. Defrauding the public with excessive charges.

b. The use of medicine of doubtful value; deceiving the patient with claims which are unjustified.

c. The failure to follow accepted diagnostic procedures prior to treatment.

d. Defrauding the public by intimidation of patients with scare tactics.

e. Defraud and deceiving the patients with unjustified promises of cure.

f. Statements made to patients which are likely to deceive them with relation to their physical condition.

g. The failure to provide for adequate relief of pain to the patient.

h. The prescription of diets which are contrary to accepted principles.

"The specific charges above outlined refer to the following patients:

1. Mrs. Lucinda Limp, Salem, Indiana, who was treated on or about April, 1950.

2. Mr. J. Fred Herms (deceased), of Louisville, Kentucky, who was treated on or about February or March, 1950.
3. Mrs. Mary Frances Rucker of North Pleasureville in Henry County, treated sometime during 1943.
4. Mrs. A. E. Brooks of Shelby County, treated during 1937.
5. Mr. and Mrs. Williams, Waddy, Kentucky, treated during 1937.
6. Mrs. Sam Melton, Hopkins County, treated during February or March, 1950."

It is important to note that the general charge of "grossly unprofessional conduct of a character likely to deceive or defraud the public" in the complaint was couched in the exact language of Subsection (4) of Section 311.110 of the Kentucky Revised Statutes. (See Appendix B-1 on page 84.)

Subsection (1) of Section 311.120 of the Kentucky Revised Statutes (1948 Ed.), in effect in 1950 at the time of the institution of the Board's action against Dr. Bandeen, reads as follows:

> "(1) In every proceeding for suspension or revocation the holder of the license shall be furnished with a copy of the complaint and given at least thirty days thereafter to prepare for the hearing. He may be heard in person and by counsel. The board may take oral or written proof for and against the complaint as it considers will best present the facts."

Nothing contained in this statute or any other statute required that a complaint against a licensee be prepared in any particular form or that it be signed by any particular person or at all. However, it is apparent that the signing of the notice of hearing by the secretary was tantamount to the signing of the complaint also, inasmuch as the complaint was incorporated by reference into the notice of hearing. Both documents were enclosed in the same sealed envelope.

The manifest intent of the proviso that in every revocation proceeding the holder of the license shall be furnished with a copy of the complaint and given at least 30 days thereafter to prepare for the hearing, was to require that at least 30 days prior to the hearing the licensee be notified of the alleged acts and conduct which, if proved, would constitute grounds for license revocation.

In Davis on Administrative Law (1951 Ed.), page 278, *et seq.*, it is said:

> "The key to pleading in the administrative process is adequate opportunity to prepare. When an original notice or pleading is inadequate, it is normally supplemented by informal communication, by formal amendment, by a bill of particulars, by pre-hearing conferences, or by ample continuance at the hearing. And the question on review is not the adequacy of the original notice or pleading but is fairness of the whole procedure * * *. One who is given inadequate notice is not prejudiced when long enough before the hearing the particulars are furnished informally."

In *N. Y. C. R. R.* v. *Interstate Commerce Commission*, 168 F. 131, it was said:

> "The Interstate Commerce Commission is an administrative tribunal dealing with practical problems. So long as parties affected by its orders appear and are fully heard, we think it would be most unfortunate to deny its power to grant such relief as the facts shown upon the investigation should call for, even though such facts might be outside the issues raised * * *. The strict rules of pleading should not be applicable to it."

In accord:

Dickerson v. *L. & N. R. R.*, 191 F. 705.
L. & N. R. R. v. *Sloss-Sheffield Steel & Iron Co.*, 295 F. 53, affirmed 269 U. S. 217, 70 L. Ed. 242.
Lewis-Simas Jones Co. v. *Southern Pacific*, 283 U. S. 654, 75 L. Ed. 1333.
Staley Mfg. Co. v. *Fed. Trade Com.*, 135 F. 2d 453.

Detailed notice was given to Bandeen substantially more than 30 days before the hearing that was conducted at Louisville on September 7, 1950. This notice set out the charges, the specifications, and the names and addresses of particular persons involved. Both Bandeen and his counsel were present at the hearing and participated therein, and neither requested a continuance or postponement thereof.

(3) Bandeen Was Afforded a Fair and Impartial Trial.

Wide discretion is granted to administrative agencies in conducting hearings. *Reinsperg* v. *Reed,* 313 Ky. 683, 233 S. W. 2d 412. Proceedings before administrative agencies may be informal; wide latitude in the manner of presenting evidence should be afforded, and technical rules of procedure should not be enforced. *Goodrich* v. *Selligman,* 298 Ky. 863, 183 S. W. 2d 625. Proceedings before an administrative agency carry a presumption of fairness and correctness. *Jefferson County Planning and Zoning Commission* v. *Ogden,* 307 Ky. 362, 210 S. W. 2d 771.

The Board was eminently fair to Bandeen and his counsel, as evidenced by the many concessions and courtesies extended to both of them. Neither Bandeen nor his counsel can seriously contend that they were not fully heard by the Board, by the Governor's Commissioner, by the Franklin Circuit Court, and twice by the Court of Appeals of Kentucky. They have not had merely their "day in court". They have had almost seven years in court.

Despite Bandeen's denial of some of the testimony of some of the witnesses, the Board saw and heard Mr. Rucker, Mr. and Mrs. Limp, and Mrs. Herms, and of course took into consideration their demeanor and motives as well as their testimony. There is no indication that any of those witnesses were inspired or prompted by evil motives to testify against Bandeen. On the contrary, there is every indication that they were motivated by a desire to be of public service by

relating their experiences with Bandeen. It appears from the record that their testimony was candid and frank and that Bandeen's testimony was evasive and, in some instances, duplicitious.

Needless to say, the Board would have been intrigued to listen to evidence of any cancer cures effected by Bandeen. The hearing presented to Bandeen an opportunity to introduce patients and former patients to testify as to his claimed wonders of the Koch Cancer Treatment and also as to the marvelous results he claimed to have achieved with the use of this concoction. But the only witness produced by Bandeen was Mrs. Richardson, his office nurse, who testified concerning some office treatments that he gave to Mrs. Limp and Mr. Herms.

Bandeen testified that so far as he knew only one other person in the entire State of Kentucky was using the Koch Cancer Treatment (Board Proceedings, p. 129). He also stated that he was aware that the Koch Cancer Treatment had been condemned by the American Medical Association (Board Proceedings, p. 129).

No doubt this Court is curious about the details of the Koch Cancer Treatment. A lengthy and detailed discussion thereof is contained in a decision of the Federal Trade Commission issued on August 23, 1951, as the result of a proceeding by that agency against the Koch Laboratories, *et al.* (Docket No. 2772), that involved a lengthy and expensive hearing at which exhaustive testimony was taken from numerous persons. For the convenience of the Court, a copy of findings,

decision and order of the Federal Trade Commission in that case is incorporated in the Appendix hereto. (See Appendix A-7 on page 64 of this brief.) It will be observed from a reading thereof that the Federal Trade Commission found that the so-called Koch Cancer Treatment has no therapeutic value but, on the contrary, has adverse effects on some patients, and that the advertising material relating thereto was false and deceptive; also that the Commission order that the Kochs cease and desist from disseminating by mail or by interstate commerce any advertisement claiming that it constitutes adequate treatment for cancer or *"that any of said preparations possess therapeutic value or that their use will be of benefit in the treatment of any disease of the human body or in animals."* That decision was referred to in briefs filed with the Board; and a copy thereof was filed in the Franklin Circuit Court as Exhibit A to the answer and as an appendix of the brief filed with the Court of Appeals of Kentucky.

The decision of the Federal Trade Commission, referred to above, was *affirmed* by the Sixth United States Court of Appeals on July 8, 1953. *Koch, et al.* v. *Federal Trade Commission,* 206 F. 2d 311.

The hearing before the Federal Trade Commission in the matter of Koch Laboratories, Inc., was begun before the Board's action against Dr. Bandeen was instituted and a decision was entered by the Federal Trade Commission prior to the Board's order of revocation of Dr. Bandeen's license. The hearing before the Federal Trade Commission involving Koch Labora-

tories was a very elaborate and expensive affair. The cease and desist order of the Federal Trade Commission was issued on August 24, 1951. The "Findings and Order" of the State Board of Health were issued on December 13, 1951.

An administrative agency acting in a judicial or *quasi*-judicial capacity may, like the judge of an ordinary court, take judicial notice of matters of common knowledge and, in addition, may also act upon its specialized knowledge acquired through official experience in agency work. The State Board of Health is charged by law with the protection of the public health. In addition to being charged with the enforcement of the Medical and Osteopathic Practice Act of Kentucky, it is also charged with the enforcement of the state food and drug laws. The Board undoubtedly may take judicial notice of a cease and desist order of the Federal Trade Commission involving any food or drug preparation.

The opinion of the Court of Appeals of Kentucky properly states that the Federal Trade Commission's opinion was a finding of law and not one of fact, hence, the Board could take judicial notice of it.

Findings of an administrative board are conclusive if supported by any substantial evidence.

Hunt s Admix. v. *Fuqua*, 311 Ky. 497, 224 S. W. 2d 917.

Miracle v. *Harlan Wallins Coal Corp.*, 311 Ky. 169, 223 S. W. 2d 738.

Blue Diamond Coal Co. v. *Hensley*, 314 Ky. 85, 234 S. W. 2d 317.

Greyhound Corp. v. *Steele*, 237 S. W. 2d 833.

At 70 Corpus Juris Secundum, page 904, it is said:

> "While a determination by the board that certain conduct constitutes unprofessional conduct is not binding on the court, the decision of the board on questions of fact at least, will be given very high consideration; and, generally speaking, the findings of the board should not be disturbed where it had jurisdiction and acted honestly and impartially, and not arbitrarily, or, as sometimes said, in the absence of fraud, corruption or oppression."

In *Kendall* v. *Beiling,* 295 Ky. 782, 175 S. W. 2d 489, the Court said, in sustaining an order of the Board revoking a license to practice optometry, that "due regard for the spirit and purpose of the statute in lodging the primary power in a competent board of the medical profession will be observed, and their decision upon questions of fact will be given very high consideration."

In *Board of Health of Covington* v. *Kollman,* 156 Ky. 351, 160 S. W. 1052, the Court said that: "Being the agency created by the legislature * * * the presumption is always in favor of the board of health and it will not be interfered with unless it appears unreasonable or oppressive."

(4) The Decision of the Court of Appeals of Kentucky as to the Construction and Application of Its Own Statutes Is Binding Upon the Supreme Court of the United States.

(A) THE MEDICAL AND OSTEOPATHIC PRACTICE ACT OF 1952 DID NOT INVALIDATE THE BOARD'S ORDER OF LICENSE REVOCATION.

Prior to June 19, 1952 (the effective date of the Medical and Osteopathic Practice Act of 1952), a licensee whose license had been revoked by the Board was permitted to appeal to the Governor who was authorized to affirm or overrule the decision of the Board. Bandeen appealed to the Governor after the Board entered its order on December 13, 1951. By Section 311.595(1) of the 1952 Act, the State Board of Health retained its authority to revoke licenses on an expanded number of grounds including the four grounds listed under the repealed statute. The new Act deleted the right of an appeal to the Governor set forth in Section 311.120(3) of the old Act, and provided that appeals from the Board shall be prosecuted through the *Jefferson Circuit Court*. It is important to note that the administrative appeal to the Governor authorized by the 1904 Act (KRS 311.120(3), 1948 Ed.) provided that a licensee whose license was revoked by the Board "may" appeal to the Governor and that the Governor "may" affirm or overrule the decision of the Board. The administrative appeal, therefore, was optional and it did not constitute a part of the Board's revocation procedure. The Board was the license revoking authority. Its action was completed. The Governor had

no authority to revoke a license. His authority on appeal to him was limited to merely affirming or overruling the Board's order of revocation (KRS 311.120(3), 1948 Ed.). Bandeen's appeal to the Governor was based upon the Board's order of revocation. It was a final order of the Board, otherwise it would not have been appealable.

The Board's order dated December 13, 1951, expressly provides that it *"hereby absolutely revokes* any and all licenses heretofore issued by said Board to the Respondent, Stanley G. Bandeen, to practice osteopathy, to administer drugs and/or to practice any healing art whatsoever, within the Commonwealth of Kentucky." The language that followed, fixed a definite time ("midnight on December 30, 1951") as the effective date of license revocation, and provided for a stay of enforcement of the order pending decision by the Governor on an appeal taken by Bandeen to him prior to December 30, 1951.

In the case of *Jackson* v. *Commonwealth* (Ky.), 249 S. W. 2d 20, it was argued that because a sentence was probated there had been no conviction. However, the Court of Appeals of Kentucky expressed the view that probation of a person convicted in a criminal proceeding merely suspended the judgment.

In the instant case, the Board's order of revocation was stayed or suspended during the pendency of Bandeen's appeal and became of full force and effect upon its affirmance.

The case at bar involves the construction of several state statutes. In the case of *International Harvester*

Co. v. *Kentucky,* 34 S. Ct. 853, 234 U. S. 216, 58 L. Ed. 1284, this Court held that the meaning derived by the highest state court by construing together several state statutes is as conclusive on the federal Supreme Court as though such legislation were embodied in a single act. This Court said:

> "The law of Kentucky in its present form is the result of the construction of several statutes somewhat far apart in time and of seemingly contradictory import. * * * We follow the Kentucky Court of Appeals in taking what they derive from the legislation of the state as if it were embodied in a single act."

In 54 Am. Jur., United States Courts, Sec. 246, p. 886, it is stated that "The United States Supreme Court is without jurisdiction on certiorari to review holdings of a state court which concern matters of state law and amount at most to alleged erroneous construction of statutes of a state by its own courts." See also, *Neblett* v. *Carpenter,* 305 U. S. 297, 83 L. Ed. 182, 59 S. Ct. 170, rehearing denied in 305 U. S. 675, 83 L. Ed. 437, 59 S. Ct. 335.

(B) THE BOARD'S FINDINGS AND ORDER OF REVOCATION WERE LEGALLY SUFFICIENT.

The statute under which the Board proceeding was instituted and conducted did not require that the Board set out any findings. However, the Board made a finding, as set out in its findings and order of revocation, dated December 13, 1951, that Bandeen "has, while a

licentiate of said Board, engaged in acts and conduct that were grossly unprofessional and dishonorable and of such character that they were likely to, and did, deceive and defraud the public and certain patients and persons, within the meaning of Section 311.110(4), Kentucky Revised Statutes." Thus, the Board expressly found that Bandeen had engaged in conduct denounced by KRS 311.110(4), 1948 edition.

For the convenience of the Court, the Board's findings and order of revocation referred to above is set out below, with italics being employed for emphasis in certain respects.

"COMMONWEALTH OF KENTUCKY
STATE BOARD OF HEALTH

"In the Matter of:

Stanley G. Bandeen,
Respondent

* * * * *

FINDINGS AND ORDER
OF
STATE BOARD OF HEALTH

* * * * *

"This case coming on for decision at a meeting of the State Board of Health held on December 13, 1951, and the undersigned, who constitute a majority of the members of said Board, having considered the record, evidence and briefs herein, the aforesaid State Board of Health, after deliberation in closed session, *finds that the Respondent, Stanley G. Bandeen, a licentiate of said Board,*

has, while a licentiate of said Board, engaged in acts and conduct that were grossly unprofessional and dishonorable and of such character that they were likely to, and did deceive and defraud the public and certain patients and persons within the meaning of Section 311.110(4) Kentucky Revised Statutes.

"WHEREFORE, the State Board of Health, acting pursuant to the authority conferred upon it by Sections 311.110 and 311.120 Kentucky Revised Statutes, and upon motion made by Dr. Carl J. Johnson, seconded by Dr. George S. Coon, which was unanimously adopted by the undersigned, hereby *absolutely revokes* any and all licenses heretofore issued by said Board to the Respondent, Stanley G. Bandeen, to practice osteopathy, to administer drugs and/or to practice any healing art whatsoever, within the Commonwealth of Kentucky; this order of revocation shall become effective at midnight on December 30, 1951, unless prior thereto said Respondent appeals to the Governor of the Commonwealth of Kentucky in the manner provided by Section 311.120(3) Kentucky Revised Statutes, in which event this order of revocation shall stand suspended *pending decision by said Governor upon said appeal.*

"The Secretary of the State Board of Health is directed to make this finding and order a part of the minutes of said Board, and to cause copies hereto to be forwarded to the Respondent and made a part of the record of this proceeding.

(*Doctor Bruce Underwood, Secretary of the State Board of Health, did not participate in the above described deliberation or decision.)

STATE BOARD OF HEALTH

By (s) E. M. Howard
President and member.
(s) J. Watts Stovall
Vice President and member
(s) Geo. S. Coon
Member
(s) W. H. Fuller
Member
(s) F. M. Travis
Member
(s) R. W. Robertson
Member
(s) Carl J. Johnson
Member
(s) Clarence B. Davis
Member"

It is worth noting that the motion to absolutely revoke Bandeen's license was made by Dr. Carl J. Johnson, the *osteopathic* member of the Board.

It is also worthy of note that although Dr. Underwood did not participate in the Board's deliberation or decision that took place on December 13, 1951, Dr. Underwood was not disqualified. However, in view of the bitter remarks directed to him by Bandeen's counsel from time to time, Dr. Underwood refrained from participating in said deliberation and decision as evi-

dence that he bore no malice toward Bandeen or his counsel.

In *McKay Radio and Telegraph Company* v. *Federal Communications Commission,* 97 F. 2d 641, it was held that a finding that the public interest, convenience or necessity would not be served by issuance of a radio license, was sufficient to support an order of the Federal Communications Commission denying the license. The Court said:

> "The Commission states that it reached its conclusions upon careful consideration of all the evidence and in light of the entire record * * *.
>
> "The Commission was under no obligation to recite every item of evidence, or of fact, which had some bearing on the question before it * * *.
>
> "There is no requirement that the Commission specify the weight given to any item of evidence or fact, or disclose mental operation by which its conclusions are reached."

It is true, as pointed out in the Petition, that the Court of Appeals opinion in the case at bar holds that due process of law does not require administrative agencies to make findings of fact. Whether or not this is a correct statement of the law is of no importance in the case at bar because the Board did very definitely make a finding of fact. Davis on Administrative Law, pp. 524, 526, points out that findings by courts or administrative agencies are not requirements of due process of law. There is, of course, nothing in the federal Constitution or in the Constitution of Kentucky which requires administrative agencies to make

specific findings of fact. The lower courts of Kentucky, including the circuit courts, are not required to make findings of fact. Surely an administrative body acting in a *quasi*-judicial capacity should not be required to go further than are courts of law in this respect.

CONCLUSION.

The Petition for Writ of Certiorari should be denied because:

(1) The case was decided by the Court of Appeals of Kentucky on a state jurisdictional question adequate to sustain the decision independent of any federal question involved.

(2) The decision of the Court of Appeals of Kentucky regarding the construction and application of Kentucky Statutes is binding upon this Court.

(3) Bandeen was given a fair and impartial trial.

(4) The "Complaint" and "Findings and Order" of the Board were legally sufficient.

Respectfully submitted,

WILLIAM A. LAMKIN, JR.,
JOHN P. GODFREY, JR.,
620 South Third Street,
Louisville 2, Kentucky,
Counsel for Respondents.

Dated: July 1, 1957.